

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

ROSEDALE UNION SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2006080173

DECISION

Administrative Law Judge (ALJ) Debra Huston, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on September 5, 2006, in Bakersfield, California.

Petitioner Rosedale Union School District (District) was represented by attorney Stacy Inman. Thomas Ewing, Ph.D., the District's Director of Pupil Services, attended the hearing on behalf of the District.

Student's mother was present at the commencement of the hearing, but left before District put on its case. Student's attorney, Bonnie Yates, did not appear at the hearing.¹

On August 4, 2006, District filed a due process complaint notice. Sworn testimony and documentary evidence were received at the hearing on September 5, 2006. Upon the conclusion of the District's case that same day, the record was closed and the matter was submitted.

¹ On August 11, 2006, Ms. Yates filed a response to District's due process complaint notice. On August 31, 2006, Ms. Yates filed a motion to dismiss District's complaint. On September 1, 2006, District filed a response to that motion. Counsel for Student and District were told by OAH that the motion would be decided at the commencement of hearing. At the commencement of hearing, Student's mother informed the ALJ that Ms. Yates did not appear at the hearing because she believed that OAH did not have jurisdiction to decide the matter, and that she wished to participate in the hearing by telephone. Counsel for District telephoned Ms. Yates at the direction of the ALJ, and was informed by Ms. Yates that she was not going to appear at the hearing because she believed that OAH was without jurisdiction. Student's mother's request to allow Ms. Yates to participate in the hearing by telephone was denied. Prior to the commencement of the District's case, Student's mother left the building in which the hearing was being held, leaving a note stating that she had to leave, and that the hearing could proceed without her.

ISSUES²

1. Is Student's category of eligibility language or speech disorder, or autistic-like behaviors?
2. Do the February 6, 2006 individualized education program (IEP) and the February 10, May 23 and May 25, 2006 IEP addenda, offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

CONTENTIONS OF THE PARTIES

The District contends that Student's category of eligibility for special education and related services is language or speech disorder. District further contends that its offer of extended school year (ESY) services during the summer of 2006 and placement for the 2006-2007 school year in a first grade class at American Elementary School within District is a FAPE for Student.

Student has not filed a due process complaint and, therefore, has not sought affirmative relief. Student did not put on a case at hearing. However, Student contends by way of pleadings filed in District's case, and by way of correspondence to District, that Student's primary disabling condition is autism, and that the District's offer does not constitute a FAPE. Student contends that a FAPE would include Student's repeating kindergarten and having an instructional aide in class for her second year of kindergarten. Student contends that because District has not offered a FAPE, District is liable for reimbursing Student's parents for their unilateral placement of Student in a private school. Student has demanded reimbursement from District, and that claim has not been withdrawn.

FACTUAL FINDINGS

Jurisdiction

1. Student is a six-year-old child who resides with her parents within the geographical boundaries of the District.
2. Student was evaluated by a regional center in May 2002, and qualified for an individualized family service plan and for early intervention services pursuant to that plan. She was re-evaluated in June 2003 by Fruitvale School District, and qualified for special education and related services under the category of autistic-like behaviors. In April 2004, Student transferred to District as a preschool student, and received services through the Kern County Superintendent of Schools. In June 2005, Student was identified under the categories

² For purposes of clarity and organization, the ALJ reorganized District's issues as identified in the due process hearing request.

of autistic-like behaviors and “Speech/Language Impairment.”³ Student attended kindergarten in District at Independence Elementary School during the 2005-2006 school year. During that school year, Student was included in all general education activities in the classroom. She was provided an instructional aide for the full day of kindergarten. She was also given 30 minutes of speech and language therapy one time per week.

3. Student was due for a triennial evaluation in 2006. Student was evaluated by District, and an IEP meeting for a three-year review was held on February 6, 2006. Parents were unable to attend that meeting and, for that reason, another IEP meeting was held on February 10, 2006, with the parents present. The IEP team went over with Student’s parents the provisions of the IEP developed on February 6, 2006. The IEP team agreed to reconvene to discuss ESY services, and did so on May 23, 2006, with Student’s parents present in person and their attorney present by telephone. Also present were two representatives from the Center for Autism and Related Disorders (CARD), including Vince Redmond and Theresa Bartholomew. The CARD representatives disagreed with the category of eligibility proposed by District, and recommended that Student repeat kindergarten because they believed she was not sufficiently proficient in reading and math fluency to enter first grade. The CARD representatives recommended that Student continue with CARD services for 42 hours per month for socialization. The IEP meeting was continued to May 25, 2006, to further discuss Student’s placement for the 2006-2007 school year. Student’s parents were present in person for the May 25, 2006, meeting, and their attorney was present by phone. Parents’ attorney wanted to discuss retaining Student in kindergarten with a one-to-one aide, and that suggestion was again discussed by the IEP team. Parents rejected the offer made by District, have placed Student in a private school, and have demanded reimbursement for that placement, first by letter dated July 25, 2006, and again by letter the week prior to hearing. That demand has not been withdrawn.

Eligibility Category

4. As discussed in Legal Conclusions 2 to 7, inclusive, a child qualifies for special education if he or she meets the criteria of one of the specified categories of eligibility. Among the various categories of eligibility are “language or speech disorder” (referred to as “speech or language impairment” under federal law) and “autistic-like behaviors” (referred to as “autism” under federal law).

Language or Speech Disorder

5. As discussed in Legal Conclusion 4, a child qualifies for special education and related services under eligibility category of “language or speech disorder” if his or her

³ Although Student was identified under the categories of autistic-like behaviors and “Speech/Language Impairment” in June 2005, District’s offer, from which the present dispute arises, offers Student placement and services under the category of language or speech disorder only, and not under the category of autistic-like behaviors.

language abilities are not commensurate with her chronological age, or if a discrepancy exists between the child's ability and language performance.

6. Ms. Andrea Vargas, a speech and language pathologist for District since 2003, worked with Student during the 2005-2006 academic year for one 30-minute session per week. Ms. Vargas assessed Student in January and February 2006 as part of Student's triennial assessment. Ms. Vargas administered several testing instruments, including the Goldman-Friscoe Test of Articulation, 2nd edition; the Clinical Evaluation of Language Fundamentals-Preschool, 2nd edition; the Peabody Picture Vocabulary Test-III; the Expressive Vocabulary Test; the Language Processing Test-Revised; and the Test of Pragmatic Language. Ms. Vargas also evaluated Student based on a language sample.

7. According to Ms. Vargas, Student demonstrates a borderline mild to moderate language delay. Although Student's vocabulary skills are age-appropriate and her speech intelligibility is good, Student has areas of weakness, including following directions that include temporal, sequence, and location concepts, and understanding language structure. In addition, her pragmatic language skills show delays in comparison to same-age peers. Student also demonstrates articulation errors with phonemes that are still developing for her age.

8. According to Ms. Vargas, the results of the speech and language tests she administered to Student indicate that Student's language abilities are not commensurate with her chronological age, and that a discrepancy exists between Student's ability and language performance. Therefore, Student meets the eligibility criteria for placement in a special education program based on a language disorder. Ms. Vargas recommends that Student receive direct speech and language services two times per week for 30 minutes each session. The IEP team agreed that Student fit the category of speech or language disorder.

9. District has established that Student meets the eligibility criteria specified under "language or speech disorder."

Autistic-like Behaviors

10. As discussed in Legal Conclusion 5, federal law defines "autism" as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evidence before age three, that adversely affects a child's educational performance. As discussed in Legal Conclusion 6, in order to qualify for special education services as a student with autistic-like behaviors, the student must exhibit a combination of the following behaviors, including but not limited to: (1) An inability to use oral language for appropriate communication; (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) An obsession to maintain sameness; (4) Extreme preoccupation with objects or inappropriate use of objects or both; (4) Extreme resistance to controls; (6) Displays peculiar motoric mannerisms and motility patterns; (7) Self-stimulating, ritualistic behavior.

11. Ms. Hyyon Palmer, school psychologist for District, conducted the psychoeducational evaluation of Student. Ms. Palmer holds a bachelor of arts degree in psychology from the University of California, Santa Barbara. She holds a master of education degree in school psychology from Indiana State University. Ms. Palmer is a doctoral candidate, she has completed her doctoral internship in psychology, and she expects to receive a doctorate in psychology from Indiana State University in May 2007. Ms. Palmer holds a professional clear pupil personnel services credential with authorization in school psychology. She is the primary school psychologist for one elementary school and two middle schools within District, and her primary job duties include conducting assessments of students for special education purposes.

12. In conducting her assessment of Student, Ms. Palmer interviewed Student's teacher, her instructional aide, and her mother. Ms. Palmer also observed Student in the classroom and reviewed Student's educational records. In addition, Ms. Palmer administered a number of instruments, including the Curriculum Based Measurement, Dynamic Indicators of Basic Early Literacy Skills, Adoptive Behavior Assessment System, Universal Nonverbal Intelligence Test (UNIT), Behavior Assessment for Children – Second Edition, and the Gilliam Autism Rating Scale (GARS). Danielle Hester, a school psychologist intern with Ms. Palmer, administered the Woodcock-Johnson Tests of Achievement (WJ-III TA). The administration of this test was overseen by Ms. Palmer. Ms. Hester was qualified to administer the test while supervised by Ms. Palmer. Student's kindergarten teacher, Ms. Karen Kruse, a state-credentialed teacher with five years of teaching experience, administered the Kindergarten Assessment of Proficiency Standards (KAPS).

13. Overall, Student's cognitive abilities are in the low average range.⁴ The GARS, which was the autism rating school administered by Ms. Palmer with respect to Student, is comprised of four subtests of 14 items each. Each subtest is comprised of items describing behaviors that are symptomatic of autism. Each area may result in subtest standard scores with average behaviors for children with autism ranging between seven and 14. An "autism quotient range" below 70 indicates a very low probability of autism, and an autism quotient range between 70 and 89 indicates a low probability of autism. An autism quotient range scores between 90 and 110 are average scores for students with autism, and scores greater than 111⁵ are highly indicative of autism. The standard score from the rating scale completed by Student's mother was 97, which indicates an average probability of autism. The standard score from the rating scale completed by Ms. Kruse was 81, which indicates a below average probability of autism. The standard score from the rating scale completed by Student's instructional aide from kindergarten, Mrs. Rust, was 87, which indicates a below average probability of autism. The standard score from the rating scale completed by Student's mother was higher because of higher ratings in the "Developmental" category, which includes behaviors in the first 36 months of life. Ms. Kruse and Ms. Rust

⁴ Although Ms. Palmer's report indicates Student's cognitive abilities are "well below average," this was an error in the report. The report should say "low average."

⁵ Ms. Palmer's report indicates that quotients "greater than 11" are highly indicative of autism. However, this was an error. The report should have stated that quotients "greater than 111" are highly indicative of autism.

did not rate Student in the “Developmental” area. In Ms. Kruse’s observation, Student showed more autistic-like behaviors when she was younger, and she has responded well to treatment.

14. Based on current testing, and in application of relevant provisions of the California Code of Regulations, Ms. Palmer concluded that Student does not qualify as a child with autistic-like behaviors. Although Student exhibits some autistic-like behaviors in some situations, the behaviors were not rated as extreme and were not reported as occurring consistently at home and at school. Autism ratings provided by Student’s parents, teacher, and instructional aide suggest a below average to average probability of Student having autism. It was the opinion of Ms. Cruse, Student’s kindergarten teacher for the 2005-2006 academic year, that Student did not fit the description of “autistic-like behaviors.” Of the seven characteristics that would identify an autistic child, none was applicable to Student. Student’s social skills, classroom behavior, and academic performance are improving in the general education classroom setting. Also, Ms. Palmer testified credibly that Student did not meet the criteria for a diagnosis of autism pursuant to the requirements of the Education Code and the California Code of Regulations. The IEP team agreed that Student did not meet the eligibility criteria for autistic-like behaviors.

15. District has established that Student does not meet the eligibility criteria specified under “autistic-like behaviors.”

Adequacy of District’s Offer

16. As discussed in Legal Conclusion 10, in order to determine whether a district has offered a FAPE to a student with a disability, the analysis must focus on the adequacy of the district’s proposed program. If a district’s program is designed to address a student’s unique educational needs, is reasonably calculated to provide the student some educational benefit, and comports with the student’s IEP, then the district’s offer is a FAPE, even if the student’s parents prefer another program and even if that preferred program would result in greater educational benefit.

17. District offered placement in a regular first grade at American Elementary School⁶ with 45 minutes per day of pull-out services in the learning center. The learning center is staffed by a credentialed special education teacher, Ms. Beth Wiley. Student was to be placed in the learning center to address areas of concern, including reading, mathematics, written language, and communication. District’s offer also included 30 minutes of direct speech and language services two times per week, and ESY for 3.5 hours a day for four weeks during the summer of 2006. The District’s offer of ESY included 20 hours of applied behavioral analysis (ABA) therapy at home per week, to be provided by CARD and paid for

⁶ Student was in Independence Elementary School for kindergarten. American Elementary School is a new school that opened in District for the 2006-2007 school year, and Student lives within the attendance boundaries of that school, and is no longer within the boundaries of Independence Elementary School. Therefore, the recommended placement was at American Elementary School.

by District, 12 hours of clinic time for speech and language therapy for two months, eight hours of CARD program supervision each week for eight weeks, and \$500 toward a summer program for socialization, and direct speech and language services one time per week for 30 minutes during the summer program.

Student's Unique Needs

18. Based on testing results discussed above, Student demonstrates academic need in all three core academic areas (reading, writing, mathematics), and especially in writing. Student also has unique needs in the area of speech and language, and in socialization. Student does not require a one-to-one instructional aide within the general education classroom. Her social/emotional and behavioral needs do not require the services of a one-on-one aide because her current functioning level is not impeding her learning or that of other students.

Goals and Objectives

19. The IEP team developed goals and objectives for Student during the February 6, 2006 IEP team meeting. Student's parents were not present at that meeting, but they were present at the February 10, 2006 IEP team meeting. At that meeting, the IEP team went over all of the IEP goals and objectives developed at the February 6, 2006 meeting and, based on input from Student's parents, the IEP team added more goals and objectives at the February 10, 2006 meeting.

20. A. Student's IEP goals developed at the February 6, 2006 IEP team meeting include Student learning to do the following: (1) Distinguish orally stated one-syllable words and separate into beginning or ending sounds; (2) Read simple one-syllable and high-frequency words (i.e., sight words); (3) Use concrete objects to determine the answers to addition and subtraction problems (for two numbers that are each less than 10); (4) Count, recognize, represent, name and order a number of objects (up to 30); (5) Compare two or more sets of objects (up to 10 objects in a group) and identify which set is equal to, more than, or less than the other; (6) Write upper case and lower case letters of the alphabet independently, attending to the form and proper spacing of the letters; (7) Increase knowledge and use of language concepts (temporal, sequence, location) by using sentences to describe pictures; and (8) Improve usage of prepositional phrases during structured opportunities. Objectives with specific time, frequency, and accuracy requirements were specified as to each goal.

B. The IEP goals added at the February 10, 2006, IEP team meeting include the following: (1) Student will engage in a cooperative play activity with a peer for eight minutes with a maximum of two prompts to stay at the activity in various settings; (2) Student will be able to verbalize two statements and two questions during a simple conversation with a familiar adult or peer with a maximum of two prompts in various settings; and (3) Student will be able to identify using full sentence responses as to why

another individual feels happy, sad, angry, scared, or surprised. Objectives with specific time, frequency, and accuracy requirements were specified as to each of these goals.

21. Ms. Palmer and Dr. Ewing testified credibly that the goals and objectives developed for Student were appropriate. The IEP addresses Student's deficits through measurable annual goals and short term objectives or benchmarks.

Placement

22. Ms. Kruse, Student's kindergarten teacher, recommended that Student continue to first grade, based on her performance during her kindergarten year.

23. Student's performance in kindergarten was similar to that of other students in the class. Student was able to join in any activity, and enjoyed all activities in class and recess. She had a relationship with her teacher, and had friends and relationships with other students. Student always acted appropriately. She applied rules on a daily basis. Student's on-task behavior was similar to that of other students in the class.

24. Student's current estimated learning ability, as measured by the UNIT, which was administered by Ms. Palmer as discussed above, is in the "low average" range. The results of Ms. Palmer's classroom observation indicate Student's on-task behavior was similar to other students in her class. Student's current social emotional and behavioral evaluation results, using rating scales that compared Student's behavior to a national sample of children, suggest her behavior/social skills are not significantly problematic.

25. Student's WJ-III TA results indicate Student is performing in the "average" range in basic reading and in the "well below average" range in math calculation. Student's KAPS testing suggests that as of the end of the second quarter of the 2005-2006 school year, Student had mastered approximately 51 percent of kindergarten skills. An informal assessment of Student's fine motor skills indicates Student was able to legibly write several letters, numbers, words, and shapes. Student's gross motor skills are age-appropriate.

26. In Ms. Kruse's opinion, Student acquired skills in kindergarten such that matriculation to first grade was appropriate. According to Ms. Kruse, Student had grown "tremendously" in kindergarten. Retaining Student in kindergarten would not be appropriate for Student because she had learned the subject matter. The first four months of kindergarten consist of teaching concepts that Student has already mastered. Also, Student's kindergarten peers are moving on to first grade, and Student's staying in kindergarten another year would cause her to lose those friendship bonds. Student would benefit from the extended day in first grade, which is two to two and a half hours longer than the day in kindergarten.

27. In Ms. Kruse's opinion, based on Student's progress, Student does not need a one-to-one aide for first grade. By the end of Student's kindergarten year, she did not need a shadow aide. Student received no more redirection than other children in the class. Student was appropriate in her daily activities, and did not need to be reminded by an aide. She was

able to complete tasks without very much direction. Ms. Vargas has seen Student function in the classroom and, in Ms. Vargas's opinion, a one-to-one aide would hinder Student, and Student does not need an aide with her to direct and redirect her. Academic services and instruction are provided by credentialed teachers, and not by aides.

Least Restrictive Environment

28. As discussed in Legal Conclusions 11 and 12, a substantively appropriate IEP must be provided in the LRE, i.e., Student must be educated with her non-disabled, typically developing peers to the maximum extent appropriate. Ms. Palmer was of the opinion that Student requires 45 minutes per day with a credentialed special education teacher in the learning center program. Ms. Beth Wiley, the teacher in the learning center, holds a special education credential in the area of working with children with mild to moderate disabilities. She works with six children at one time and has an aide in the classroom with her. Ms. Wiley would work with Student on her areas of unique need. Student requires this specialized instruction to address her unique needs, and this instruction cannot be provided to Student in a general education classroom. Likewise, Ms. Vargas was of the opinion that Student requires direct speech and language services for 30 minutes twice per week to address her unique needs, and these services cannot be provided in a general education classroom. The nature and severity of Student's disability is such that education in a general education with the use of supplementary aids and services cannot be achieved satisfactorily. The, the placement offered Student is the least restrictive environment.

29. Student's FAPE needs would be appropriately addressed within the first grade general education classroom, with 45 minutes per day in the learning center classroom setting with a credentialed special education teacher and instructional aide assigned to the classroom, an additional 30 minutes twice per week of direct speech and language services, and ESY services, as offered by District. This placement would provide Student with more opportunities for direct instruction focused on her specific academic needs at her instructional level, which cannot be adequately addressed within a complete general education setting with the assistance of an aide. Ms. Palmer and Dr. Ewing testified credibly that the placement and services offered by District were designed to meet Student's unique needs, and that the placement and services provided in Student's IEP were reasonably calculated to provide Student with educational benefit.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A)⁷; Ed. Code, § 56000.)

⁷ The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The allegations in this matter involves an IEP developed after July 1, 2005.

2. Under the IDEA, a child qualifies for special education if he or she has a speech or language impairment or autism, among other disabilities, and if, by reason of that disability, he or she needs special education and related services. (20 U.S.C. § 1401(a)(3)(A)(i) and (ii).) California law establishes special education eligibility categories under “language or speech disorder” or “autistic-like behaviors”, as described. (Ed. Code, §§ 56026 and 56333; Cal. Code Regs., tit. 5, § 3030(c) and (g).)

3. The federal regulations define “speech or language impairment” as “a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child’s educational performance.” (34 C.F.R. § 300.7(c)(11).)

4. State law incorporates this definition. Section 3030 of Title 5 of the California Code of Regulations includes a list of conditions, referred to in the regulation as “impairments,” that may qualify a pupil as an individual with exceptional needs entitled to special education. The “impairment” of a speech and language disorder is described in section 3030, subdivision (c), as follows:

A pupil has a language or speech disorder as defined in Section 56333 of the Education Code, and it is determined that the pupil's disorder meets one or more of the following criteria:

(1) Articulation disorder.

(A) The pupil displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention. Significant interference in communication occurs when the pupil's production of single or multiple speech sounds on a developmental scale of articulation competency is below that expected for his or her chronological age or developmental level, and which adversely affects educational performance.

(B) A pupil does not meet the criteria for an articulation disorder if the sole assessed disability is an abnormal swallowing pattern.

(2) Abnormal Voice. A pupil has an abnormal voice which is characterized by persistent, defective voice quality, pitch, or loudness.

Accordingly, the IDEIA will be applied and all citations to Title 20 of the United States Code are to sections in effect after to July 1, 2005. (See *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882, fn. 1.)

(3) Fluency Disorders. A pupil has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener.

(4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria:

(A) The pupil scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified on the assessment plan, or

(B) The pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subsection (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. If the pupil is unable to produce this sample, the language, speech, and hearing specialist shall document why a fifty utterance sample was not obtainable and the contexts in which attempts were made to elicit the sample. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified in the assessment plan.

5. The term “autism” is defined in federal regulations as: “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” (34 C.F.R. § 300.7(c)(1)(i).)

6. State law incorporates the above-referenced federal definition of autism and contains a provision regarding behaviors related to autism. The “impairment” of “autistic-like behaviors” is described in section 3030(g) of Title 5 of the California Code of Regulations, which states:

A pupil exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (a) An inability to use oral language for appropriate communication;
- (b) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood;
- (c) An obsession to maintain sameness;
- (d) Extreme preoccupation with objects or inappropriate use of objects or both;
- (e) Extreme resistance to controls;
- (f) Displays peculiar motoric mannerisms and motility patterns;
- (g) Self-stimulating, ritualistic behavior.

7. A child who meets eligibility requirements for special education is entitled to a FAPE. A FAPE is defined, in pertinent part, as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

8. Special education related services include, in pertinent part, transportation as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

9. A school district must provide a "basic floor of opportunity" . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 201 [hereafter *Rowley*].) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 [hereafter *Gregory K.*].) The public educational benefit must be more than *de minimis* or trivial. (*Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.* (3rd Cir.

2000) 205 F.3d 572, 577.) If a parent disagrees with the IEP and proposed placement, he or she may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

10. To determine whether a school district's offer constitutes a FAPE, the analysis must focus primarily on the adequacy of the proposed program. (*Gregory K.*, *supra*, at p. 1314.) If the school district's program was reasonably calculated to provide the student some educational benefit, the school district's offer will constitute a FAPE even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefits to the student. (*Ibid.*)

11. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550; Ed. Code, § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Ibid.*) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Bd. of Educ.* (5th Cir.1989) 874 F.2d 1036, 1044-45; see also *Sacramento City Unified Schl. Dist. v. Rachel H. Bd. of Educ.* (9th Cir. 1994) 14 F.3d 1398.)

12. In determining the placement of a child with a disability, each public agency shall ensure that the placement decision is made in conformity with LRE provisions, that the child's placement is based on the child's IEP, and that the placement is as close as possible to the child's home. (34 C.F.R. § 300.552.) The public agency shall also ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. (34 C.F.R. § 300.552(c).)

13. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁸ An IEP is "a snapshot, not a retrospective[.]" and it must be evaluated in terms of what was objectively reasonable when the IEP was drafted. (*Ibid.*) The focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K.*, *supra*, 811 F.2d at p.1314.)

14. An ALJ in a special education proceeding may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Cal. Code Regs., tit. 5, § 3088.)

⁸ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Office of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer Sch. Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

15. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. ____ [126 S.Ct. 528].)

Determination of Issues

Issue 1: Is Student's category of eligibility language or speech disorder, or autistic-like behaviors?

As discussed in Factual Findings 4 to 15, inclusive, and Legal Conclusions 2 to 6, inclusive, District established that Student's category of eligibility is language or speech disorder, and not autistic-like behaviors.

Issue 2: Do the February 6, 2006 individualized education program (IEP) and the February 10, May 23 and May 25, 2006 IEP addenda, offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

As discussed in Legal Conclusions 7 to 11, inclusive, an IEP is a FAPE only if it (1) is designed to meet a child's unique needs; (2) is reasonably calculated to provide some educational benefit, and (3) is the LRE for the child. As discussed in Legal Conclusion 13, the IEP must be examined based upon what was objectively reasonable at the time the IEP was developed. As determined in Factual Findings 28 and 29, based upon what was objectively reasonable at the time the IEP was developed, the February 6, 2006 IEP and the February 10, May 23 and May 25, 2006 addenda offered Student a FAPE in the LRE.

Motion for Sanctions

During the hearing, District moved for sanctions against Ms. Yates based on Ms. Yates' motion to dismiss, filed on August 31, 2006, and on her failure to appear at the due process hearing. Ms. Yates' motion to dismiss was not meritorious, and it was denied at the due process hearing. In order to prevail at the due process hearing, District was required to put on a case regardless of whether Mr. Yates appeared. Based on Legal Conclusion 14, District's motion for sanctions against Ms. Yates has been considered and is denied in that District has not established that Ms. Yates' motion to dismiss or her failure to appear at hearing were in bad faith, frivolous, or solely intended to cause unnecessary delay, as defined by law.

ORDER

1. Student's category of eligibility is speech or language impairment.
2. The District's offer, as follows, is FAPE in the LRE: Placement in a regular first grade at American Elementary School with 45 minutes per day of pull-out services in the learning center; 30 minutes of direct speech and language therapy two times per week;

ESY for 3.5 hours a day for four weeks, including 20 hours of applied behavioral analysis (ABA) therapy at home per week, to be provided by CARD and paid for by District, 12 hours of clinic time for speech and language therapy for two months, eight hours of CARD program supervision each week for eight weeks, \$500 toward a summer program for socialization, and speech and language therapy one time per week for 30 minutes during the summer program.

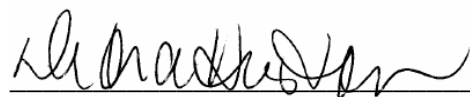
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following finding is made in accordance with this statute: *The District prevailed on all issues.*

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

IT IS SO ORDERED THIS 14th day of September, 2006



DEBRA R. HUSTON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division